Office-Supreme Court, U.S.
FILED
MAR 8 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-873

# In the Supreme Court of the United States

OCTOBER TERM, 1982

STEVEN ALLEN RICE, ET AL., PETITIONERS

*v.*

SOUTHERN CALIFORNIA EDISON COMPANY AND THE UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
*Solicitor General*

CAROL E. DINKINS
*Assistant Attorney General*

DIRK E. SNEL
ARTHUR E. GOWRAN
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTIONS PRESENTED

1. Whether 25 U.S.C. 357 and the Rights-of-Way-Act of 1948, 25 U.S.C. 323 *et seq.*, provide alternative means of acquiring allotted Indian lands.

2. Whether Southern California Edison Company was required to comply with Sections 1240.510 and 1240.610 of the California Code of Civil Procedure by demonstrating that the company's proposed use of allotted Indian lands would not unreasonably interfere with or impair the use to which the land is presently appropriated and is "a more necessary public use" than the present use.

3. Whether Section 1250.010 of the California Code of Civil Procedure, which requires that all eminent domain actions be brought in the state superior courts, strips the federal courts of jurisdiction under 25 U.S.C. 357.

## TABLE OF CONTENTS


Page

Opinions below ..... 1

Jurisdiction ..... 1

Statutory provisions involved ..... 1

Statement ..... 2

Argument ..... 3

Conclusion ..... 8


## TABLE OF AUTHORITIES

Cases:


*Bauer* v. *County of Ventura*, 45 Cal.2d 276, 289 P.2d 1 ..... 6

*City of Oakland* v. *Oakland Raiders*, 31 Cal.3d 656, 646 P.2d 835, 183 Cal. Rptr. 673 ..... 6

*Markham* v. *City of Newport News*, 292 F.2d 711 ..... 8

*Minnesota* v. *United States*, 305 U.S. 382 ..... 7

*Nicodemus* v. *Washington Water Power Co.*, 264 F.2d 614 ..... 3, 4, 8

*Oklahoma Gas & Electric Co.* v. *United States*, 609 F.2d 1365 ..... 8

*Transok Pipeline Co.* v. *Darks*, 565 F.2d 1150, cert. denied, 435 U.S. 1006 ..... 4

*United States* v. *Bowling*, 256 U.S. 484 ..... 6

*United States* v. *Minnesota*, 113 F.2d 770 ..... 4, 6

Page

Cases—Continued:

*United States* v. *93.970 Acres*, 360 U.S. 328 ..... 8

*United States* v. *Oklahoma Gas Co.*, 318 U.S. 206 ..... 6

*United States* v. *Oklahoma Gas & Electric Co.*, 127 F.2d 349 ..... 6

*Yellowfish* v. *City of Stillwater*, 691 F.2d 926 ..... 4, 5

Statutes and rules:

Act of Mar. 2, 1917, ch. 146, 39 Stat. 969 *et seq.* :

39 Stat. 969 ..... 2
39 Stat. 976 ..... 2

Act of Sept. 17, 1976, Pub. L. No. 94-416, Section 3, 90 Stat. 1275 ..... 4

Agua Caliente Equalization Act of 1959, 25 U.S.C. 951 *et seq.* ..... 2, 5

Indian Appropriations Act of 1901, Section 3, 25 U.S.C. 357 ..... 1, 2, 3, 4, 5, 6, 7, 8

Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.* ..... 5

Rights-of-Way Act of 1948, 25 U.S.C. 323 *et seq.* ..... 3, 5

25 U.S.C. 323 ..... 1, 2
25 U.S.C. 323-328 ..... 4
25 U.S.C. 324 ..... 1, 2, 4

Rule Enabling Act, 28 U.S.C. 2072 ..... 7

Page

Statutes and rules—Continued:

Cal. Civ. Proc. Code (West 1982):

§ 1235.180 ..... 6
§ 1240.510 ..... 1, 2, 3, 5
§ 1240.610 ..... 1, 2, 3, 5
§ 1250.010 ..... 1, 3, 6

Fed. R. Civ. P. :

Rule 1 ..... 7

Rule 71A ..... 7

Rule 71A(a) ..... 7

Rule 71A(k) ..... 7

Miscellaneous:

H.R. Rep. No. 94-800, 94th Cong., 2d Sess. (1976) ..... 4

# In the Supreme Court of the United States

OCTOBER TERM, 1982

---

No. 82-873

STEVEN ALLEN RICE, ET AL., PETITIONERS

*v.*

SOUTHERN CALIFORNIA EDISON COMPANY AND THE UNITED STATES OF AMERICA, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 32-38) is reported at 685 F.2d 354. The memorandum decision and order of the district court (Pet. App. 20-31) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on August 26, 1982. The petition for a writ of certiorari was filed on November 24, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTORY PROVISIONS INVOLVED

The relevant provisions of Section 3 of the Indian Appropriations Act of 1901, 25 U.S.C. 357, the Rights-of-Way Act of 1948, 25 U.S.C. 323 and 324, and Cal. Civ. Proc. Code §§ 1240.510, 1240.610 and 1250.010 (West 1982), are set out at Pet. 7-9.

## STATEMENT

1. On September 25, 1979, respondent, the Southern California Edison Company ("SCE"), a California public utility corporation, filed a complaint in the United States District Court for the Central District of California seeking to condemn a right-of-way to install electrical transmission lines across certain parcels of land within the Agua Caliente Indian Reservation to the east of Palm Springs, California. The affected lands had been allotted to petitioners (the Indian allottees).[1] SCE alleged jurisdiction under 25 U.S.C. 357. The United States, as trustee for the Indian allottees, was named a defendant.

The Indian allottees filed an answer raising the following defenses: (1) condemnation of rights-of-way is not available to SCE under 25 U.S.C. 357 but only pursuant to 25 U.S.C. 323 and 324;[2] (2) SCE's complaint failed to state a claim upon which relief could be granted because it failed to comply with Sections 1240.510 and 1240.610 of the California Code of Civil Procedure;[3] and (3) California had

---

[1]The allottees are members of the Agua Caliente Band of Cahuilla Indians. The allotments were authorized by the Act of Mar. 2, 1917, ch. 146, 39 Stat. 969, 976, and the Agua Caliente Equalization Act of 1959, 25 U.S.C. 951 *et seq.* The allotments were made in 1961 by the issuance of patents by the United States in which the government declared that it would hold the parcels of land in trust for the allottees for at least 25 years from the date of issuance.

[2]25 U.S.C. 324 requires that no grant of a right-of-way over or across any lands belonging to a tribe shall be made without the consent of the proper tribal officials. That statutory provision further provides that rights-of-way over and across allotted lands of individual Indians may be granted without the consent of the individual Indian owners in four situations, none of which is relevant here.

[3]Sections 1240.510 and 1240.610 of the California Code of Civil Procedure require that a condemnor demonstrate that: (1) his proposed use of the subject lands will not unreasonably interfere with or impair any other public use to which the land is already appropriated, and (2) his proposed use is a more necessary public use than the use to which the property is presently appropriated.

disabled itself, and others acting under its authority, from taking advantage of 25 U.S.C. 357 because California Code of Civil Procedure Section 1250.010 requires that all condemnation actions be brought in state superior court.

The district court rejected each of the Indian allottees' claims and entered partial summary judgment for SCE on September 10, 1980 (Pet. App. 20-31). The district court, following the Ninth Circuit's decision in *Nicodemus* v. *Washington Water Power Co.*, 264 F.2d 614 (1959), held that 25 U.S.C. 357 authorized condemnation of rights-of-way over allotments. The court also determined that Sections 1240.510 and 1240.610 of the California Code of Civil Procedure were inapplicable because the subject lands were not presently appropriated for a public use; the allotments were for the benefit of individual Indians, rather than for the general public. The court of appeals affirmed (Pet. App. 32-38).

## ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Petitioner's principal argument (Pet. 15) is that rights-of-way across allotted Indian lands are now governed by the Rights-of-Way Act of 1948 ("1948 Act"), 25 U.S.C. 323 *et seq.*, and that 25 U.S.C. 357, upon which SCE relied, remains applicable only to non-right-of-way situations, such as the condemnation of an entire interest. Alternatively, petitioners maintain that the 1948 Act repealed 25 U.S.C. 357. These arguments are without merit.

The 1948 Act and 25 U.S.C. 357 form a unified statutory scheme for acquiring rights-of-way over allotted Indian land. A state-authorized condemnor may proceed under either statute to obtain a right-of-way over allotted lands. The potential condemnor may apply to the Secretary of the

Interior for a right-of-way under the 1948 Act, provided the consent of the allottees is obtained,[4] or he may proceed under 25 U.S.C. 357 to condemn the right-of-way. Since the 1948 Act authorizes the Secretary to grant only rights-of-way, a condemnor seeking an interest greater than this type of partial estate in an allotted tract must proceed under 25 U.S.C. 357.

The courts of appeals have uniformly held, as the Ninth Circuit did here, that 25 U.S.C. 357 and the 1948 Act provide alternative methods for acquiring rights-of-way through allotted Indian lands. *United States* v. *Minnesota*, 113 F.2d 770, 773 (8th Cir. 1940); *Nicodemus* v. *Washington Water Power Co., supra*, 264 F.2d at 617-618; *Yellowfish* v. *City of Stillwater*, 691 F.2d 926, 929-930 (10th Cir. 1982);[5] *Transok Pipeline Co.* v. *Darks*, 565 F.2d 1150, 1153 (10th Cir. 1977), cert. denied, 435 U.S. 1006 (1978). The single contrary decision by the district court in Nebraska (Pet. 11-12), presently on appeal to the Eighth Circuit and presumptively subject to reversal in light of that court's ruling in *Minnesota, supra*, does not create a "cloud," as petitioners assert (Pet. 15). Although this Court has never decided the issue, that does not of course require an exercise of certiorari jurisdiction in the absence of a conflict among the courts of appeals.

---

[4]There are four exceptions to this consent requirement. See 25 U.S.C. 324.

[5]As the Tenth Circuit Court of Appeals noted in *Yellowfish, supra*, 691 F.2d at 930, 25 U.S.C. 357 is still in force. The court found it persuasive that in 1976 Congress extended the operation of Section 357 and reemphasized the applicability of 25 U.S.C. 323-328 to the Pueblo Indians of New Mexico. See Act of Sept. 17, 1976, Pub. L. No. 94-416, Section 3, 90 Stat. 1275; H.R. Rep. No. 94-800, 94th Cong., 2d Sess. 3 (1976). The court of appeals in the instant case likewise so held (Pet. App. 36 n.4).

Petitioners stress (Pet. 13-14) that Congress' establishment of a new policy for Indian lands in the Indian Reorganization Act of 1934 ("IRA"), ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.*, and the 1948 Act, repudiated the allotment policies upon which 25 U.S.C. 357 was predicated. But they overstate the change in policy in contending (Pet. 14) that Congress fashioned an inflexible rule that always "prevent[s] the alienation or transfer of allotted lands without the consent of the Indian landowners."

The fact remains that prior to 1934 thousands of allotments had been approved and the IRA did not eviscerate these allotments.[6] Section 357 was, and still is, a necessary tool for accommodating the requirements of state and local governments to the remaining allotments. Section 357 is needed today, as it was in the early years of this century, to enable rights-of-way to be acquired for public purposes. *Yellowfish* v. *City of Stillwater, supra,* 691 F.2d at 930.

2. Petitioners contend (Pet. 16) that the decision of the court of appeals frustrates congressional intent by permitting allotted lands to be treated as if they served no public purpose. Essentially, they argue that because 25 U.S.C. 357 expressly provides that allotted lands may be condemned for any public purpose "under the laws of the State or Territory where located," SCE was required to comply with Sections 1240.510 and 1240.610 of the California Code of Civil Procedure by demonstrating that the company's proposed use of the condemned lands will "not unreasonably interfere with or impair," and is more necessary than, the use to which the property is presently appropriated. The court of appeals held (Pet. App. 34-35) that these lands are

---

[6]Indeed, petitioners admit (Pet. 9) their allotments are based in part on allotment provisions enacted by Congress long after the Indian Reorganization Act of 1934. See Agua Caliente Equalization Act of 1959, 25 U.S.C. 951 *et seq.*

not appropriated to public use and, therefore, the pleading requirements under California eminent domain law are inapplicable.

Lands allotted in severalty, as here, are no longer tribal lands. *United States* v. *Oklahoma Gas Co.*, 318 U.S. 206, 214-215 (1943); *United States* v. *Bowling*, 256 U.S. 484, 486-487 (1921); *United States* v. *Oklahoma Gas & Electric Co.*, 127 F.2d 349, 353-354 (10th Cir. 1942); *United States* v. *Minnesota, supra*, 113 F.2d at 773. Thus, the court of appeals correctly determined that since Congress has chosen to place Indian allottees in the same situation as those who own land privately for their sole use and benefit, the potential for a conflict in public uses that arises when a public entity attempts to condemn land already in use for a public purpose is not present here.[7]

3. While petitioners concede (Pet. 17) that "all actions under 25 U.S.C. § 357 *must* occur in federal district court, exclusive of *any* state court," they, nevertheless contend (Pet. 18) that because Section 1250.010 of the California Code of Civil Procedure provides that all eminent domain actions must be brought in the state superior courts, the condemnation rights conferred by 25 U.S.C. 357 are not

---

[7]When Congress consented to state condemnation of allotted Indian lands "for any public purpose," 25 U.S.C. 357, it clearly indicated that it did not consider allotted land to be property already appropriated to a potentially conflicting public use. In addition, neither the California legislature nor its courts have remotely suggested that allotted Indian lands could be characterized as lands in public use. California has defined " 'property appropriated to public use' " as "property * * * in use for a public purpose." Cal. Civ. Proc. Code § 1235.180 (West 1982). The California Supreme Court has construed "public use" as " 'a use which concerns the whole community.' " *City of Oakland* v. *Oakland Raiders*, 31 Cal.3d 656, 665, 646 P.2d 835, 841, 183 Cal. Rptr. 673, 679 (1982), quoting *Bauer* v. *County of Ventura*, 45 Cal.2d 276, 284, 289 P.2d 1, 6 (1955).

available to California or to any entity authorized by that state.[8] Petitioners' contention fails to recognize that 25 U.S.C. 357 is a grant of condemnation right from Congress, not from the State of California. Furthermore, in *Minnesota* v. *United States*, 305 U.S. 382, 389 (1939), this Court definitively resolved this question when it stated (emphasis added; footnote omitted):

> Minnesota contends that Congress authorized suit in a court of the state by providing in the second paragraph of § 3 of the Act of March 3, 1901, quoted above, for "condemnation of" lands allotted in severalty to Indians "in the same manner as land owned in fee." But the paragraph contains no permission to sue in the court of a state. It merely authorizes condemnation for "any public purpose under the laws of the State or Territory where located." *There are persuasive reasons why that statute should not be construed as authorizing suit in a state court. It relates to Indian lands under trust allotments — a subject within the exclusive control of the federal government. The judicial determination of controversies concerning such lands has been commonly committed exclusively to federal courts.*

---

[8]Petitioners also assert (Pet. 18) that Rule 71A(k), Fed. R. Civ. P., and the Rules Enabling Act, 28 U.S.C. 2072, when read together with California statutes, somehow require that this condemnation be commenced in state superior court. This is clearly unfounded. Rule 71A(k) merely provides that, where the state power of eminent domain is invoked in a federal court, state procedural law must give way to the Federal Rules of Civil Procedure, except that state laws requiring jury trials "of any issue" or trials by commission or by jury "of the issue of compensation" shall govern. See also Rules 1 and 71A(a), Fed. R. Civ. P. Nothing in Rule 71A or in 28 U.S.C. 2072 incorporates the California venue statute providing that condemnations be brought in state superior court.

See also *Nicodemus* v. *Washington Water Power Co., supra,* 264 F.2d at 615. Thus, as the court of appeals correctly determined (Pet. App. 37-38), California cannot strip a federal court of its congressionally granted jurisdiction over suits involving state-created rights. See *Markham* v. *City of Newport News,* 292 F.2d 711, 713 (4th Cir. 1961); cf. *Oklahoma Gas & Electric Co.* v. *United States,* 609 F.2d 1365, 1366 n.2 (10th Cir. 1979) (under 25 U.S.C. 357 state does not acquire the right to utilize state procedures or to apply state laws in condemnation suits). Federal law governs unless Congress chooses to make state law applicable. *United States* v. *93.970 Acres,* 360 U.S. 328, 332-333 (1959). Here, Congress did not so choose.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
*Solicitor General*

CAROL E. DINKINS
*Assistant Attorney General*

DIRK D. SNEL
ARTHUR E. GOWRAN
*Attorneys*

MARCH 1983

DOJ-1983-03